In The

Supreme Court of the United States

October Term, 1971

No.

In the Matter of the Application of ARTHUR KATZ and others named in the schedule annexed hereto,

Petitioners,

vs.

SOLOMON HOBERMAN, as Persnnel Director of the Department of Personnel of The City of New York and as Chairman of The Civil Service Commission of The City of New York; MILTON SAMORODIN and JAMES W. SMITH, as Commissioners of The Civil Service Commission of The City of New York; and THE CIVIL SERVICE COMMISSION OF THE CITY OF NEW YORK,

Respondents,

for an Order, pursuant to Article 78 of the Civil Practice Law and Rules, directing that the Respondents validate the Captains Promotional Examination given on January 18, 1969, and further directing that the action of the Respondents in cancelling the examination of January 18, 1969 and the setting of a new examination dated for May 24, 1969 be declared null and void, and further directing that the respondents be enjoined from conducting the said examination, now scheduled for May 24, 1969, pending the final determination of the within proceedings.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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SUPREME COURT OF THE UNITED STATES

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No.

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Petitioners,

vs.

SOLOMON HOBERMAN, as Persnnel Director of the Department of Personnel of The City of New York and as Chairman of The Civil Service Commission of The City of New York; MILTON SAMORODIN and JAMES W. SMITH, as Commissioners of The Civil Service Commission of The City of New York; and THE CIVIL SERVICE COMMISSION OF THE CITY OF NEW YORK,

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for an Order, pursuant to Article 78 of the Civil Practice Law and Rules, directing that the Respondents validate the Captains Promotional Examination given on January 18, 1969, and further directing that the action of the Respondents in cancelling the examination of January 18, 1969 and the setting of a new examination dated for May 24, 1969 be declared null and void, and further directing that the respondents be enjoined from conducting the said examination, now scheduled for May 24, 1969, pending the final determination of the within proceedings.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Petitioners, James F. Mooney, Robert Littlefield and Richard Solieri on behalf of all petitioners pray that a Writ of Certiorari issue to review the judgment of the Court of Appeals of the State of New York entered in the above entitled action pursuant to its decision rendered May 26, 1971.

Opinions Below

The original decision and memorandum of the Court of Appeals of the State of New York (Appendix A) is reported at 28 N.Y.2d 530.

The decision of said Court granting petitioner's motion for reargument (Appendix B) is not yet reported.

The Court's memorandum decision and the dissenting opinion following reargument (Appendix C) is not yet reported.

The decision denying petitioner's motion to amend the remittitur (Appendix D) is not reported.

Jurisdiction

The original decision of the Court of Appeals which reversed an Order of the Appellate Division of the First Department[1] and dismissed the Petition herein was rendered January 7, 1971. A timely motion for reargument was made and granted, and reargument was had on April 22, 1971. On May 26, 1971, the Court rendered its decision and judgment adhering to its earlier decision.

The jurisdiction of this Court is revoked pursuant to 28 U.S.C. Section 1257(3).

1. The Appellate Division affirmance was five to nothing with no opinion.

Questions Presented

On January 18, 1969, under the supervision of the New York City Civil Service Commission three identical written examinations were administered for promotion to the rank of Captain in the Police Department of the City of New York; in the New York City Transit Police Department and in the New York City Housing Authority. All petitioners in the Courts below, including all petitioners who continue to participate in this action, participated in one of those three examinations.[2]

Based upon the tentative key released following the examinations, all petitioners believe that their performances were sufficient to place among the groups successfully passing the examinations and therefore entitling them to be placed upon eligible lists for promotion within their respective departments.

---

2. Originally there were 122 petitioners in the Courts below. There presently remain 54 petitioners participating in the within Petition for Writ of Certiorari. These petitioners are:

James F. Mooney	John H. Driscoll
Jack W. Clark	Frank J. Parodi, Jr.
Joseph Hillery	John Gallagher
Robert G. Holl	Franklyn J. Walling
Walter A. Delaney	John Sherlock
John McBarnette	Simon F. Lovett
Richard Solieri	William H. Walker, Jr.
Robert F. Burke	Eugene J. Burke
Thomas V. Coyne	Thomas F. McAndrews
Armando R. Garcia	Robert J. Johnson
Gustav K. Kramer	Robert A. Littlefield
John Meehan	Charles E. Mercer
Joseph F. Calzerano	Eugene P. Murphy
Brendan J. King	Sal Russo

(Cont'd)

On March 18, 1969 and before any of the examination papers had been graded the respondent issued a Press Release announcing that the examinations held on January 18, 1969 were cancelled and further announcing that new examinations would be held in their place.

The cancellation of the examinations was prompted by the recommendation of the three man Civil Service Commission, which had determined that twelve of the questions on the January 18, 1969 examinations had been included among the thousands of questions published in a 1962 issue, "Police Yearbook," a study guide published by the Davis Publishing Company of California. The release contained an explanation that the Examiners who prepared the January 18, 1969 examination had utilized the questions believing them to be unreleased Police Promotional Test questions. The release contained the following:

"* * * it is possible * * * that some can-

(Cont'd)

Felicia Shpritzer	Irving Moore
Leonard A. Kaplan	Joseph Maguire
James J. Skennion	Joseph Flynn
Gerard V. Beatty	Richard Boland
John Keane	Richard Schauffert
John Doyle	William Smith
Thomas O'Hara	Jack Hartigan
William Neuendorf	Thomas Wallace
James Vaccaro	John Atkins
John Dunlap	Charles Betencourt
Fred Fischer	Charles Rorke
Walter Stone	William Bormann
Richard McBride	John McMann

Lt. Katz, the first named petitioner in this proceeding, is no longer an interested party.

didates taking this test reviewed the (12) questions prior to the date of the written test."

It was the opinion of the respondent, HOBERMAN also contained in the release, that:

"'This destroys the competitive nature of the examination, raises questions concerning the integrity of the examining process and reduces reliability of the test, all in violation of the New York State Constitution. . . .'"

There was no proof offered at any time by the respondent Commission to support their conclusion that the integrity of the examination had been impeached.

The following questions are presented:

1. Was it a denial of petitioners' rights to due process and equal protection of the law under the Fourteenth Amendment to the Constitution of the United States for respondent to cancel the three examinations solely on the assumption that the inclusion of the twelve questions impeached the integrity and impaired the competitiveness of the examination, absent any proof to support these contentions?

2. The Courts of the State of New York have held that a participant to a Civil Service examination, once the examination is held, becomes vested with certain rights. Petitioners contend that those rights are in the nature of inchoate property rights. Assuming this to be so, absent an offer of proof to support respondent's contention that the integrity of the examination was impeached, did not the Commission violate petitioners' rights to due process under the Fourteenth Amendment?

3. By allowing the Commission to cancel an entire examination by exercising "hindsight judgment" without proof that an examinee gained familiarity with repeat questions or that the utilization of repeat questions impeached the integrity of the examination, has not the Court below given such undue latitude to the Commission and so restricted the application of Section 7803 of the New York Civil Practice Law and Rules, as to violate petitioners' rights to due process under the Fourteenth Amendment?

4. The decision of the Court below is based on assumptions that are unwarranted by and directly contrary to the facts established by the record on appeal. As such, is the decision not violative of petitioners' rights to due process under the Fourteenth Amendment?

The foregoing constitutional questions were argued in the Court of Appeals upon reargument and raised on petitioners' motion to amend the remittitur.

Statement

Petitioners in the Court below initiated this proceeding for the purpose of declaring null and void respondent's cancellation of the examinations given on January 18, 1969 and to enjoin the holding of substitute examinations. The Notice of Examination for Captain, Police Department of the City of New York (38)[3] indicated that the pass mark on the written examination, would be the score of the candidate who ranks 120th in the order of comparative rating. Similarly, pass marks for the other two examinations were to be determined in the order of comparative rating. All petitioners, based upon a tentative key pub-

3. Numerical reference in parentheses are to pages of the record on appeal to the New York Court of Appeals.

lished by the Commission, believe that they performed sufficiently to place them among the groups of candidates passing the respective examinations. However, other candidates not participating in this proceeding could also benefit in the event that they place within these categories. Similarly, although all original petitioners to this proceeding are no longer participating herein they too could benefit by the reinstating of the examinations given on January 18, 1969.

The twelve questions in issue dealt with correct English usage. There was no requirement, however, that any of the petitioners correctly answer all, or any of them, in order to pass the examination. These twelve questions in English usage had previously appeared on a Police Promotional examination given in Los Angeles, California, in 1959. It was the policy of the Civil Service Commission of Los Angeles, California in 1959 to release test booklets at the end of an examination. The Civil Service Commission of the City of New York had the same policy until 1964.

It is conceded that these twelve questions on English usage were properly included in the 1962 "Police Yearbook" published by the Davis Publishing Company of California. That publication is similar to publications put out by the Arco Publishing Company, a company that publishes study aids widely used in preparation for Civil Service examinations by New York City Civil Service employees. The Davis Publications are readily available in New York City and obtainable in the New York City and other public libraries.

All applicants to the three examinations received a "Suggested Bibliography for Preparation for Police Promotional Tests" dated September 27, 1968 (40). The introduction to that Bibliography stated as follows:

> "The forthcoming written test for promotion in the Police Service (New York City Police Department, Transit Police Department, Housing Police Department) will be of the multiple choice type. The questions in these tests will be substantially based on but not restricted to material contained in the authorized tests, periodicals and publications listed here" (40).

It was established by petitioners, and not denied by respondents, that at least 27 other questions on the examination had been taken verbatim from previous Police Promotional examinations given in New York City prior to 1964 (88). These 27 questions can be found, as can all other released test questions, in Arco Publications readily available to the public (19-30).

The Commission at no time has denied that it is their practice to draw questions from previous examinations in the preparation of new examinations. This, despite their awareness that these questions are readily available to participants for review (88-89). As a matter of fact the Commission admits the necessity of doing so (88).

It is admitted by the Commission that the inclusion of multiple choice type grammar questions upon the January 18, 1969 examinations marked

the first time that such questions were utilized on a Police Promotional examination and there was no proof offered that any participant to these examinations had any reason to believe that questions on English usage would be utilized (17-18).

Special Term granted to petitioners the relief requested, to wit: a directive that the determination of the Commission cancelling and annuling the examinations be annulled, that the examination papers be marked and that the new examinations be cancelled (5-6; Opinion of Marks, J., at 90-95). The Appellate Division, First Department, unanimously affirmed the said order annuling the cancellation (33 A.D. 2d 753).

On further appeal the Court of Appeals reversed the decisions below and directed that the petition be dismissed (28 N.Y. 2d 530). It adhered to that decision upon reargument.

Reasons for Granting the Writ

1. Petitioners wish to direct the attention of the Court to the Petition for Writ of Certiorari to the Court of Appeals of the State of New York brought in the matter of the application of John J. Elliot et al., against Solomon Hoberman. The Elliot proceeding was a companion action to the within proceeding in the Courts below. Petitioners herein are in full accord with the reasons for the granting of a Writ set forth in the Elliot Petition to this Court.

Respondents throughout all proceedings in the Courts below have maintained the position that:

> "... The Petitioners were merely put to the necessity of taking a second examination with a minimum lapse of time, where for all that is or can be shown. Petitioners will do no less well on the new examination than they would on the examination held on January 18, 1969."

It would be most difficult to formulate a proposition that so totally fails to recognize the very foundation of a Civil Service System. The prime moving force in a Civil Service System such as exists in United States is that of open competitiveness. Its keystone is an open road to promotion based upon merit, experience and competitive performance measured by objective standards. Any action which frustrates these functions, which weakens this foundation and which attacks the keystone of this system will inevitably destroy it.

The participants to this examination were not novices to this system. They are men who for many years have loyally devoted their lives, often with great sacrifice, to their profession in law enforcement. Some approach retirement age. Almost all are family men. Economic pressures, personal health and health of family members, personal problems and problems of family members, duties to one's family, responsibilities in the community, are all factors which will effect one's performance. Preparation for such an

examination is an arduous task which often involves great personal sacrifice. Many hours are spent in study, often a candidate's family is called upon to make sacrifices as well. In many cases a candidate will be forced to give up a second job in preparation for an examination, with resulting economic loss. A candidate's family is often neglected by the many hours of study required. Hopefully the sacrifice bears fruit. It would be difficult to envision a more frustrating and demoralizing experience than to expend the time, make the sacrifice, and earn the reward of success, only to see an examination cancelled because those responsible for the examining process, based upon unwarranted assumptions and without proof, believe that they could have administered a better examination. One can readily see that with all of these factors bearing upon one's performance, one is never "merely" put to the necessity of taking a second examination.

Once the examination is held it must be considered that participants have earned vested rights in that examination. Earned by hard work, by long hours of study, by sacrifice, by sweat and often by tears.

The cancellation of the promotional examinations given on January 18, 1969 by the Civil Service Commission of the City of New York, in total disregard for the rights of petitioners, must be considered by this Court to be a denial of their constitutionally guaranteed rights and must be considered by this Court to be a grave threat

to the administrative processes under the various Civil Service Systems of this nation. It is submitted that guidelines for the protection of the constitutional rights of participants to Civil Service examinations and guidelines for the scope of judicial review of administrative determinations in this area is of such vital importance as to warrant consideration by this Court.

2. It is the law in New York State that anyone is entitled to institute a proceeding to review an allegedly invalid reclassification of positions subject to a merit Civil Service System. Matter of Mandle v. Brown, 4 A.D. 2d 283, 164 N.Y.S. 2d 366 (1957). Similarly the New York Court of Appeals has held that even unsuccessful candidates to an examination, whether personally aggrieved or not, as citizens of the State, may insist upon competitive Civil Service examinations. Matter of Cash v. Bates, 301 N.Y. 258, 93 N.E. 2d 835 (1950). Chironna v. Watson, 304 N.Y. 255, 107 N.E. 2d 289 (1952). Certainly, as a matter of logic, it would follow that once a candidate has participated in an examination, he becomes vested with inchoate property rights of a higher order than those to which he is entitled as an ordinary citizen. Assuming these rights, under Article 5, Section 6 of the New York State Constitution, have not these rights been infringed upon and are not petitioners' rights to due process under the Fourteenth Amendment being violated when the Civil Service Commission, absent proof and based upon supposition not supported by the facts, cancels an examination? Has not the Commission, by divesting petitioners of their property rights

without a showing of proof to support their action, violated petitioners' rights to due process and equal protection of the laws under the Fourteenth Amendment? Petitioners submit that these questions must be answered in the affirmative. The petitioners were never afforded a formal hearing in order to determine whether any facts had been established to support the Commission's determination that the integrity of the examination had been impeached. The record on appeal, pages 14-16, indicate that the only opportunity afforded petitioners to air their grievances was the meeting which took place at the office of Department of Personnel on April 1, 1969. That meeting took place after the respondents had cancelled the examination. It was determined at that meeting, and it has never been denied by respondents, that no applicant had any actual knowledge of the questions on the examination and that questions can be taken from public sources of information. In short, the respondents' position is based on unfounded suppositions not based in fact; on hindsight judgment, not proof. Petitioners were divested of a property right without any opportunity to air their position and to defend their rights. The Commission, at the meeting of April 1, 1969, admitted that the Civil Service procedures do not provide for such hearing prior to the Commission taking action, nor for that matter following such action. It is submitted that the lack of such procedural safeguards in the administrative processes of the Civil Service Commission are in flagrant disregard of petitioners' rights to due process and equal protection of the laws under the Fourteenth Amendment.

3. It is agreed by all parties that an examination, to be competitive, must employ objective standards capable of review by other examiners of equal ability and experience. Young v. Trussel, 42 Misc. 2d 108; Matter of Fink v. Finegan, 270 N.Y. 356, 361-363. Unless it is established that these standards have been compromised the Civil Service Commission cannot cancel an examination. Matter of Ebling v. New York State Civil Service Commission, 305 N.Y. 221, 226.

Section 7803(3) of the Civil Practice Law and Rules provides for a review of whether an administrative determination:

> "... was made in violation of lawful procedure, was effected by an error of law or was arbitrary and capricious or an abuse of discretion...."

The essential question presented is whether this Section, as applied by the Court below, afforded petitioners due process and equal protection of the laws as required by the Fourteenth Amendment. It is submitted that the decision of the Court below, in applying that Section, renders it impossible to adequately protect petitioners' rights and renders it impossible to preserve objective testing standards.

The Commission, in arguing in support of its action, points to Rule 4.5.4 of the Rules and Regulations of the Municipal Civil Service Commission which empowered the Commission to correct manifest error or mistake. " ... anytime

prior to the establishment ... of an eligible list ...."

While it is true that a Civil Service Commission in preparing an examination had a wide latitude, as it does in setting rules for the conducting of such examinations, wholly subjective standards, once an examination has been held, will inevitably result in abuse, discrimination and a breakdown of required objective standards. It is submitted that once an examination is held the Commission cannot be allowed to exercise discretion with the same degree of latitude. No examination can be given, no action can be formulated and no testing technique can be utilized which cannot in some way be improved upon. A Civil Service Commission cannot be allowed to second guess itself as to the quality of the examination given without some objective viable standard. In this instance the only objective standard which could be used would be one which, supported by facts, clearly illustrated that the integrity of the examinations was impeached; the objectivity of the examinations lost. The Court below, in applying CPLR Sec. 7803(3) in effect determined that the Commission has the right to cancel the examination at its own whim. It is submitted by petitioners that once these examinations were held the application of Rule 4.5.4, absent objective standards, deprived petitioners of their constitutional rights under the Fourteenth Amendment. That Section, so applied, is so vague and standardless that it fails to meet the requirements of the due process clause. See: Giaccio v. Pennsylvania, 282 U.S. 399, 402-403.

Respondents admit that it is common practice to utilize test questions previously used and in fact point to the necessity of utilizing such questions (88-89). See Bruns v. Suffolk County Civil Service Commission, 56 Misc. 2d 925.

The cancelling of an examination, properly administered, on the grounds that a candidate in the course of study gained familiarity with repeat questions is simply devoid of logic. It has been and still is petitioner's position that familiarity with those questions would be in all respects proper when available to everyone, as conceded in this proceeding. While the Commission may be believed in its assertion that it would not use twelve questions in order from a previous examination, nevertheless, once an examination is administered the inclusion of such questions can in no way be considered to impeach the integrity of the examination.

To place such action by the Commission beyond the scope of judicial review will afford the Commission, carte blanche power to exercise second or hindsight judgment following the administering of any examination. Repeat questions have been and will continue to be used on every Civil Service examination as well as on other examinations such as Bar examinations, examinations for the licensing of physicians, dentists and in other professional licensing fields. The Commission is clearly seeking to elevate itself to a position beyond the scope of judicial review and the Court below, in rendering its decision, has effected that result.

The Court below has given to the New York City Civil Service Commission the means by which to discriminate in the administering of examinations without affording Civil Service employees equal protection and due process of the laws. Yick Wo v. Hopkins, 118 U.S. 356, 373-374. Petitioners submit that it is the duty of this Court, as it was the duty of the Court below, to be watchful for the constitutional rights of a citizen and against " ....any stealthy encroachment thereon." Mapp v. Ohio, 367 U.S. 643.

Unless this Court acts to define the powers of a Civil Service Commission and the scope of judicial review from an administrative determination once an examination is held, it is submitted that the rights of Civil Service employees in municipalities throughout this Country are in grave peril.

4. The decision of the Court below is based on assumptions that are unwarranted by and directly contrary to the facts established by the record on appeal. Due process requires that a Court in rendering its decision base its decision on the facts established by the record and not on unwarranted assumptions. Slochower v. Board of Education, 230 U.S. 551, 559. The parties must be afforded due process of law. Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673, 681-682.

Petitioners submit that the assumptions which were the basis of respondents' decision to cancel the examinations were erroneous and illogical.

To conclude that the integrity of the examination was impeached when the record clearly shows that questions on English usage had never been utilized on a Police Promotion examination is clearly erroneous. The suggested bibliography included no reference materials on English usage. To conclude that the review of questions contained in publications in the public domain impeaches the integrity of an examination is erroneous. To conclude that the use of questions on a previous examination can in any way impair the competitiveness of an examination when the Court can take judicial notice of such universal practice in the preparation of examinations in almost all professional licensing fields is clearly erroneous.

It is encumbent upon this Court under these circumstances to afford petitioners their constitutionally guaranteed rights. Shelly v. Kraemer, 334 U.S. 1, 14-16; People v. Utica Daw's Drug Co., 16 A.D. 2d 12, 17.

The petitioners participated in Civil Service examinations which were properly administered. All candidates participated on an equal footing. No proof was ever introduced to the contrary. Nevertheless in derogation of their rights the examinations were cancelled. To allow such a decision to stand clearly violates petitioners' rights to due process and equal protection of the laws under the Fourteenth Amendment of the Constitution of the United States.

Conclusion

For the foregoing reasons, this petition to a writ of certiorari should be granted.

Dated: August 12, 1971.

Respectfully submitted,

s/ Sylvester J. Garamella
Attorney for Petitioners

Sylvester J. Garamella
Vincent P. Rao,
Richard T. Sinrod,
Of Counsel

Appendix A.

28 NEW YORK REPORTS, 2d SERIES 530

MEMORANDUM. It is a "fair argument", and this is the test of the arbitrariness with which the commission is charged (see *Matter of Wirzberger v. Watson*, 305 N. Y. 507, 513), first, that familiarity with the questions in dispute, and knowledge of the official answers to them, derived by some examinees from prior study of the 1962 *Police Yearbook* could well impair the competitiveness of the examination, and, second, that the possibility of the acquisition of such prior knowledge was not so unreasonable or so remote as to warrant the finding that the commission's action was arbitrary. Our decision in *Matter of Chironna v. Watson* (304 N. Y. 255, mot. for rearg. den. 304 N. Y. 738), which the parties construe with some divergence, dealt with "defects which concededly made the original examinations noncompetitive" (p. 258), and hence with the propriety of the corrective action undertaken, and did not, of course, encroach upon the broad area of administrative discretion conferred upon the commission in determining the basic issue of competitiveness.

The orders appealed from should be reversed, without costs the determination of the municipal civil service commission reinstated, and the petitions dismissed.

In the Matter of Elliott: Chief Judge FULD and Judges BURKE, BERGAN, BREITEL, JASEN and GIBSON concur; Judge SCILEPPI dissents and votes to affirm on the opinion at Special Term in *Matter of Katz v. Hoberman*, decided herewith.

Order reversed, without costs, the determination of the municipal civil service commission reinstated and the petition dismissed in a memorandum.

Appendix B.

STATE OF NEW YORK, COURT OF APPEALS.

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Fifteenth day of April A. D. 1971.

Present.

Hon. Stanley H. Fuld,
Chief Judge, presiding.

Mo. No. 289

IN THE MATTER

of

The Application of JOHN J. ELLIOT & ors.,

Respondents,

for a judgment & c.

vs.

SOLOMON HOBERMAN, Personnel Director of the City of New York, and together with JAMES W. SMITH and MILTON SAMORODIN, constituting the Department of Personnel of the City of New York and the City Civil Service Commission of the City of New York,

Appellants.

A motion for reargument of the above cause having heretofore been made upon the part of the respondents herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is granted and the case set down for argument during the week of April 19, 1971.

A copy

GEARON KIMBALL
Deputy Clerk

(Seal.)

Appendix C.

Memorandum

COURT OF APPEALS,
STATE OF NEW YORK.

1. No. 436. 70

IN THE MATTER

of

The Application of ARTHUR KATZ & ors., & c.,

Respondents,

vs.

SOLOMON HOBERMAN, as Personnel Director of the Department of Personnel of the City of New York & c., & ors., & c.,

Appellants.

1. No. 437. 70

IN THE MATTER

of

The Application of JOHN J. ELLIOT & ors.,

Respondents,

for a judgment & c.

vs.

SOLOMON HOBERMAN, Personnel Director of the City of New York, & c., & ors., & c.,

Appellants.

MEMORANDUM:

Upon reargument, we adhere to our original decision and memorandum and write further only to touch upon certain questions suggested on the reargument—one as to the propriety of the common practice of using questions propounded on previous examinations and the other as to practicability of excising the questions here in dispute.

The examination was cancelled, before any of the papers had been graded, when the Commission learned that it had been mistaken in believing that there had not been released to the public the California examination from which it had extracted and used, in completely identical form, a block of 12 multiple-part questions. Neither the Commission's cancellation of the examination nor our decision sustaining that action reflected adversely upon the general and entirely proper practice of utilizing previous examinations as sources of questions. Appellant Director, in opposing the article 78 application in this case, stated that such is the appellants' practice but that they "would never excerpt 12 questions ad seriatim from a single previous examination for inclusion in another examination; nor would they lump together a series of questions borrowed from a previous examination."

As respects the practicability of excising the 12 disputed questions, which dealt with correct English usage, it is clear that the decision to apply tests in this subject to candidates for police captaincies was within the area of the Commission's authority and, accordingly, that judicial excision of the questions would constitute an improper intrusion upon the Commission's prerogatives and a substitution of the court's judgment for that of the Commission, in contravention of the fundamental law obtaining in this area.

SCILEPPI, J. (dissenting):

Today, a majority of this Court, upon reargument, adheres to its reversal in *Matter of Katz v. Hoberman* and *Matter of Elliot v. Hoberman* (28 N. Y. 2d 530). I dissented from the original determination for the reasons expressed in the opinion at Special Term (61 Misc. 2d 411) and, now, again dissent on the opinion at Special Term. I add only the following comments.

There is no factual dispute in this case. Respondents, lieutenants in the New York City Police Department, New York City Transit Police Department and New York City Housing Authority Police, are civil service employees and were eligible to take promotional examinations to the position of captain in their respective departments. On January 18, 1969 appellants conducted such an examination at which time respondents competed. On March 18, 1969 before any of the papers had been graded, the City Department of Personnel issued a press release in which the January examination was cancelled and a new examination was scheduled for May 24, 1969. It was stated therein, that 12 questions on the January examination were originally taken from a 1959 California police promotional examination which the examiner had thought was unpublished but that an investigation revealed that the questions were identical to those published in the *1962 Police Yearbook*, and since that publication had been available in the New York area for several years, it was concluded by the Commission that:

> This destroys the competitive nature of the examination, raises questions concerning the integrity of the examining process and reduces reliability of the test, all in violation of the New York State Constitution.

Upon the cancellation of the January examination and the scheduling of a new examination, respondents commenced the instant Article 78 proceedings.

The Appellate Division (33 A. D. 2d 753), by affirming orders of Special Term, found that appellants had acted arbitrarily because the use of the 12 questions did not impair the competitiveness of the examination (61 Misc. 2d 411). A majority in this Court reversed, and reinstated the determination of the Civil Service Commission (28 N. Y. 2d 530). It reasoned that appellant's action in cancelling the examination could not be considered arbitrary because, vested with broad administrative discretion, the Commission could reasonably determine that the competitiveness of the examination was impaired by the possibility that some candidates may have used the *1962 Police Yearbook* in their preparation for the examination. The court has placed reliance on our decision in *Matter of Chironna v. Watson* (304 N. Y. 255 mot. for rearg. den. 304 N. Y. 738). This case is, however, simply not in point. There, after an open book examination had been administered and graded, it developed that five questions in that examination had been printed in a reference book, and that some candidates might have had access to this book in the examination room. It was conceded there, however, that this factor rendered the examination noncompetitive; hence, the sole question before the Court was not that of competitiveness but the propriety of the corrective measures employed by the Civil Service Commission. Unlike *Chironna*, the examinations involved in this case were not "open book," and we are required to pass on the basic issue of competitiveness.

Now, on reargument, the majority attempts clarification by adding that this decision is to have no adverse effect upon the accepted practice of utilizing previous examination questions in the preparation of subsequent

examinations. Further, it finds some significance in the fact that the disputed 12 questions were grouped together, rather than interspersed throughout the examination. If prior publication of questions is to be the criteria for a declaration of noncompetitiveness, then it should make no difference where they appear on the examination. Hence, I remain unpersuaded by this hypertechnical rationale employed by the majority.

In reviewing the administrative action taken against respondents, the basic question presented is, of course, whether the cancellation of the examination was arbitrary, capricious or unreasonable. Our constitution provides that civil service appointments and promotions must "be made according to merit and fitness to be ascertained, as far as practicable, by examinations which, as far as practicable, shall be competitive * * *" (N. Y. Const., Art. V, § 6; see Civil Service Law, § 50; *Matter of Fink v. Finegan*, 270 N. Y. 356). Appellants have been charged with the performance with this mandate. Although they are vested wide latitude of discretion in this regard (see *Matter of Wirzberger v. Watson*, 305 N. Y. 507, 513), it is by no means unfettered and is subject to review by this Court. The reason for this is clear. Inasmuch as the competitiveness of civil service examinations is a concept embodied in our constitution, decisions, such as those made by the appellants herein, are to be treated as questions of law (see CPLR 7803 [subd. 3]). Stated differently, appellants' discretion in these matters, does not give them the power to act without standards and it is the constitution, as construed by the courts, which is the source of the criteria which are to be employed by civil service commissions in determining whether or not a particular examination is defective.

Thus, if the examinations involved in the cases at bar remained competitive, despite the prior publication, then appellants have abused their power as a matter of law

since their action is devoid of a viable standard. This question was answered in the affirmative by the courts below; and, as I have indicated, I am in complete agreement with the conclusions that no proof was adduced which would establish such infirmity in the examination.

It is significant here that neither the Civil Service Commission nor for that matter any of the other appellants, had any proof that any candidate for promotion had seen the *Police Yearbook* before the examination was administered. Indeed, appellants' action seems predicated on the mere possibility that this was in fact what occurred. I am unable to see how this speculative assumption can be viewed as being sufficient to sustain their action. But even assuming that all candidates had read and studied the *Police Yearbook*, the competitiveness of the examination would nevertheless remain unimpaired. As is abundantly clear, prior to the examination candidates were given a suggested bibliography and specifically advised in a circular prepared by the New York City Police Academy and acquiesced in by the Commission, that:

> The forthcoming written tests for promotion in the police service (NYCPD Transit PD, Housing PD) will be of the multiple-choice type. *The questions in these tests will be substantially based on, but not restricted to,* materials contained in the authoritative texts, periodicals and publications listed here. Note the fact that although these many sources are listed, candidates should not assume that equal emphasis will be given to each source, nor that the order of the sources is related to the order of the questions on the test, nor that all the listed materials will in fact be used, nor that candidates are expected to be conversant

> with every word in every text or reference listed. This list has been prepared solely for your convenience and as a guide to your study efforts. (Emphasis supplied.)

It is my view that upon receipt of this information, a prudent candidate for promotion would immerse himself in the materials listed and other relevant sources so as to prepare for the examination. Though the *Police Yearbook* was not named in the bibliography, there is no question but that it qualifies as an appropriate study material. Inasmuch as good preparation often involves the examination and study of the type of question which is usually employed by the examiners, I am at a loss to understand how efficient preparation for an examination would render it noncompetitive.

All candidates had this opportunity and I consider it manifestly arbitrary and unfair to penalize those whose study and research involved months of effort, particularly where, as here, the basic problem was created by the appellants and not by any candidate. In every examination, there are always those who are more diligent in their preparation. This is why some are successful and others are not. Some candidates, in the hope of attaining a passing grade, enroll in courses which are specifically geared to the study of materials upon which the examination is based. The majority's decision in these cases would seem to suggest that if an instructor should happen to mention questions which, fortuitously, are later found on the examination, appellants would be justified in cancelling the examination as noncompetitive. This is untenable and jeopardizes other types of examinations. For example, candidates for admission to the bar of this state have, for years, studied questions which purportedly were on old examinations. The decision reached by the court would appear to cast serious doubt on this long accepted practice. Though the court sanc-

tions the use of prior examination questions, it nevertheless concludes that if it is later discovered that they have *legitimately* entered the public domain, the examination is no longer competitive. Consequently, if a candidate wishes to refer to a sample-type question as a part of his preparation he must do so at the risk of a subsequent determination that the examination has become noncompetitive for that reason. This not only inhibits effective preparation, but also necessarily entails a senseless duplication of effect, on the part of both the candidate and the examiners. These considerations should not be overlooked in reaching a just determination of the cases at bar.

Accordingly, I am unable to agree that the prior publication of the 12 questions rendered the examination noncompetitive and conclude that the courts below have correctly determined that the cancellation of the examination was arbitrary, capricious and an abuse of discretion.

* * *

In each case: Upon reargument, original decision of reversal dated January 7, 1971 adhered to in a memorandum. All concur except Scileppi, J., who dissents and votes to affirm the order appealed from in an opinion.

Appendix D.

STATE OF NEW YORK, COURT OF APPEALS.

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Tenth day of June A. D. 1971.

Present,

Hon. Stanley H. Fuld,
Chief Judge, presiding.

---

1 Mo. No. 543

IN THE MATTER

of

The Application of JOHN J. ELLIOT & ors.,

Respondents,

for a judgment & c.

vs.

SOLOMON HOBERMAN, Personnel Director of the City of New York, & c., & ors., & c.,

Appellants.

& ano. proceeding—*Mtr. of Katz v. Hoberman.*

A motion for a stay and to amend the remittitur in the above causes having heretofore been made upon the part of the respondents herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied in each respect.

A copy

GEARON KIMBALL
Deputy Clerk

(Seal.)

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SUPREME COURT, U. S.

(40,281)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71 -

Supreme Court, U. S.
SEP 9 1971
E. ROBERT SEAVER, CLERK

In the Matter of the Application of

JAMES F. MOONEY and others named in the schedule annexed hereto,

Petitioners,

vs.

SOLOMON HOBERMAN, as Personnel Director of the Department of Personnel of The City of New York and as Chairman of The Civil Service Commission of The City of New York; MILTON SAMORODIN and JAMES W. SMITH, as Commissioners of The Civil Service Commission of The City of New York; and THE CIVIL SERVICE COMMISSION OF THE CITY OF NEW YORK,

Respondents,

For an Order, pursuant to Article 78 of the Civil Practice Law and Rules, directing that the Respondents validate the Captains Promotional Examination given on January 18, 1969, and further directing that the action of the Respondents in cancelling the examination of January 18, 1969 and the setting of a new examination dated for May 24, 1969 be declared null and void, and further directing that the respondents be enjoined from conducting the said examination, now scheduled for May 24, 1969, pending the final determination of the within proceedings.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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STANLEY BUCHSBAUM,
EDMUND B. HENNEFELD,
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ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK*

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Jurisdiction

Respondents do not question the jurisdiction as set forth in the Petition other than to contend (1) that no substantial federal question is presented in the within case, and (2) that no such question was timely raised in the courts below.

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* In the Court of Appeals of the State of New York, this action was *sub. nom., "Matter of the Application of Arthur Katz and others v. Hoberman".*

Questions Presented

The questions presented, respondents contend, are not as the Petition for Certiorari states.

The question actually presented is whether under New York State law the action of the New York City Civil Service Commission in cancelling a promotion examination before any of the papers were graded and scheduling another examination in its place to be held shortly thereafter, was arbitrary, capricious or unreasonable, or involved illegality or bad faith, all within standards in this regard imposed by New York State law.

A second, subsidiary question, is whether the supposed substantial federal question was timely raised in the courts below.

Statutory and Administrative Provisions Involved

NEW YORK CITY CHARTER:

"Personnel Director, Powers and Duties.—

> § 813. The personnel director shall have the following powers and duties in addition to the powers and duties vested in him as the head of the department:
>
> * * *
>
> c. At the direction of the civil service commission, to schedule and conduct examinations for positions in the civil service;"

RULES AND REGULATIONS OF THE NEW YORK CITY MUNICIPAL CIVIL SERVICE COMMISSION:

> "Rule 4.5.4. Except as otherwise provided by resolution or regulation of the commission, no test, subject, part or record of an examination shall be subject to review, alteration or re-rating after the ratings of the examiners have been registered or attested thereon as required. However, the commission, at any time prior to the establishment or dur-

ing the existence of an eligible list, may correct any manifest error or mistake made in connection with an examination, on its own initiative or in the granting of a claim of manifest error or mistake. * * * The nature of such manifest error or mistake shall be set forth in its minutes."

Statement

On January 18, 1969, the written civil service examination in suit was held pursuant to the rules and regulations of the New York City Civil Service Commission for promotion to Captain in the New York City Police Department, the New York City Transit Police Department and the New York City Housing Authority Police Department. This is the same civil service examination that is the subject of the petition for a writ of certiorari to the Court of Appeals of the State of New York entitled, *Matter of the Application of John J. Elliott, et als, petitioners, against Solomon Hoberman, respondents,* October Term, 1971, No. , presently pending undetermined before this Court.

On March 18, 1969, and before any of the papers had been graded (32), the City Department of Personnel issued a press release advising that the examination had been cancelled that day and that a new examination was being scheduled for May 24, 1969, to take its place (43).

The press release gave as the basis for the Commissioner's action that investigation by the Assistant Director of Examinations had revealed that twelve of the questions were identical with questions previously published in the 1962 issue of the "Police Yearbook", that those twelve questions had been taken from a police promotion examination held in California in 1959, that the Personnel Department's examiners had obtained the questions from a California jurisdiction supposing them to be from an "unreleased" police promotion test and were unaware at the time that the questions had been published in the "Police Year-

book", and that the Yearbook itself had been available in the New York area for several years. For these reasons it was possible, the Commission Chairman said, that some candidates taking the examination had reviewed the twelve questions prior to the test (44). The questions themselves, he said, were "an essential part of the examination" (45), and to eliminate them would destroy the validity of the test (*ibid.*).

The release went on to state that the judgment of the Personnel Director was that inclusion of the questions impaired the "competitive nature of the examination", raised questions "concerning the integrity of the examining process and reduce(d) reliability of the test", all in violation of the New York Constitution, Article 5, § 6 (44).

The twelve questions used in the 1959 California police promotion test had been included in the 1962 Yearbook, and then in the January 18, 1969 examination, not only word-for-word but in the same order (61-62, 66-67, 87). The Yearbook was a publication of the Davis Publication Company that had been sold and distributed in the New York area for a number of years (87).

On March 24, 1969, there appeared in the New York City Record a notice of the new examination to take the place of the other and to be held on May 24, 1969 (13). Candidates who had filed for the January 18 test were not required to re-file (44, 58).

An affidavit filed by the respondent Personnel Director stated that respondents (88-89),

> "would never excerpt 12 questions ad seriatim from a single previous examination for inclusion in another examination; nor would they lump together a series of questions borrowed from a previous examination."

The New York Supreme Court held that respondents had acted "arbitrarily" in cancelling the examination and accordingly granted judgment voiding that administrative

determination (94-95). The New York Appellate Division affirmed on the opinion at Special Term (101). The New York Court of Appeals, however, reversed the Appellate Division and held that respondents' action was not arbitrary (Appendices A and C to Petition).

ARGUMENT

The sole issue before the State courts was the arbitrariness of an administrative act on New York State law grounds. No federal constitutional issue was raised until reargument in the New York Court of Appeals. At that point, it was too late to raise such an issue under New York practice.

Under the law of the State of New York, the exercise of the Commission's function of scheduling and conducting examinations may be the subject of judicial review only on a clear showing that the action taken by the Commission in the exercise of its conferred powers (New York City Charter § 813, subd. c), was arbitrary, capricious or unreasonable or that there was involved bad faith or illegality. *Matter of Conlon* v. *McCoy*, 22 N. Y. 2d 356, 362-363 (1968); *Matter of Wirzberger* v. *Watson*, 305 N. Y. 507, 513-514 (1953); *Matter of Cowen* v. *Reavy*, 283 N. Y. 232, 237 (1940), mot. den. 284 N. Y. 596 (1940); *Matter of Firsheim* v. *Reavy*, 263 App. Div. 490 (3rd Dept., 1942), affd., 289 N. Y. 712 (1942); *Davis* v. *Wiener*, 260 App. Div. 127 (4th Dept., (1940). In *Matter of Wirzberger* v. *Watson, supra*, 305 N. Y. 507 (1953), Chief Judge Lewis said (p. 513):

> "The decisional law on the problem is that the commission's fixing of the minimum requirements for admission to an examination is not to be interfered with by the courts if any fair argument can be made to sustain its action, '* * *' even though they may differ from the commission as to its advisability' * * *."

In its memorandum opinion the Court of Appeals held that the action of the respondents was not arbitrary. On reargument it adhered to this decision and dealt with some aspects of that decision—one, its impact on the practice of using some questions propounded on prior examinations and, two, the practicability of excising the questions in issue.

It is clear from the above that there is no federal question, substantial or otherwise, in this case. None was presented by the record, none was argued in the briefs of counsel to the New York Court of Appeals in the first instance, none is reflected in that Court's decision or opinion.

The question before the State courts was simply whether the action of respondents in cancelling the examination under the circumstances of this case was so arbitrary, capricious or unreasonable as to require the setting aside of that administrative determination. That was the sole question presented to the State courts, and it was the only question decided by the New York Supreme Court, the Appellate Division and the Court of Appeals. That Court's memorandum in deciding both this case and the companion case *Elliott* v. *Hoberman* (Appendices A and C to Petition) naturally makes no mention of any federal question. The first time the supposed federal question was raised was on the motion for reargument and on the reargument in the State Court of Appeals.

The Court of Appeals, in adhering to its original decision after the reargument, made no reference to the federal constitutional question raised for the first time in connection with the reargument. Undoubtedly, this was because it was too late to raise such an issue.

Thereafter, the petitioners applied to the Court of Appeals to amend the remittitur to recite that the federal constitutional questions were presented and necessarily passed upon by the Court of Appeals. This was opposed on the ground that, under New York practice, constitutional

issues could not be considered by the Court of Appeals unless they were raised in the lower courts, citing the following cases: *Matter of O'Neill* v. *Board of Regents*, 298 N. Y. 777 (1948; appeal dismissed); *Matter of Carroll* v. *Grumet*, 305 N. Y. 692 (1953; appeal dismissed); *Nathan* v. *Equitable Trust Co.*, 250 N. Y. 250, 253 (1929; judgment affirmed); *Nod-Away Co.* v. *Carroll*, 240 N. Y. 252 (1925; judgment affirmed); Cf., *Radio Station WOW* v. *Johnson*, 326 U. S. 120, 128 (1945).

The Court of Appeals denied the application to amend the remittitur on June 10, 1971 (Appendix D). This clearly was an application of the consistent New York practice requiring constitutional issues to be raised in a court below the level of the Court of Appeals. This Court recognizes the validity of such a rule and refuses to entertain appeals where it has not been complied with. See STERN & GRESSMAN, *Supreme Court Practice* (Fourth Ed.), § 3.27.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

September 6, 1971.

Respectfully submitted,

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